

EX PARTE OR LATE FILED



Cincinnati Bell
Telephone®

P.O. Box 2301
Cincinnati, Ohio 45201

September 13, 1994

Mr. William F. Caton
Acting Secretary
Federal Communications Commission
1919 M Street, NW, Room 222
Washington, DC 20554

FEDERAL COMMUNICATIONS
COMMISSION
OFFICE OF THE
SECRETARY

SEP 13 '94

RECEIVED

RE: **Ex-Parte Presentation**
Cincinnati Bell Telephone's Petition for Waiver
of Section 24.204 of the Commission's Rules to
Permit Full Participation in Broadband PCS
License Auctions
AND
Cincinnati Bell Telephone's Request for Stay
in the matter of Amendment of the Commission's
Rules to Establish New Personal Communications
Services: and Implementation of Section 309 (j)
of the Communications Act - Competitive
Bidding, Dockets 90-314 & 93-253

Dear Mr. Caton :

In accordance with Commission rules governing ex-parte presentations, please be advised that today, Mrs. Debby Disch, Vice-President-Marketing and Strategic Planning, William D. Baskett and Tom Taylor, Counsel for Cincinnati Bell Telephone, met with Chairman Reed Hundt's Special Assistant, Karen Brinkmann. The discussions covered issues associated with the above referenced proceedings. Cincinnati Bell Telephone's position on such issues are of public record.

I am filing two copies of this letter and the corresponding documents in accordance with Section 1.1206 (a) of the Commission's rules. Please contact Mrs. Lynda Breen, Federal Docket Manager on (513)397-1265 if you have any questions.

Sincerely,

Attachments

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DOCKET FILE COPY ORIGINAL

July 21, 1994

Mr. William F. Caton, Acting Secretary
Federal Communications Commission
1919 M Street, N.W., Room 222
Washington, D.C. 20554

In the Matter of:

Amendment of the Commission's Rules
to Establish New Personal
Communications Services: and

Implementation of Section 309(j)
of the Communications Act -
Competitive Bidding

)
)
) GEN Docket No. 90-314 /
) RM-7140, RM-7175, RM-7618
)
)
) PP Docket No. 93-253
)

Dear Mr. Caton:

Enclosed please find an original and six copies of the Cincinnati Bell telephone Company's Request For Stay, in the above referenced proceedings.

Please date stamp and return the enclosed duplicate copy of this letter as acknowledgement of its receipt. Questions regarding this document should be directed to Ms. Lynda Breen at the above address or by calling (513) 397-1265.

Sincerely,

Cheryl N. Campbell

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**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

In the Matter of)	
)	
Amendment of the Commission's Rules)	GEN Docket No. 90-314
to Establish New Personal Communications)	RM-7140, RM-7175, RM-7618
Services; and)	
)	
Implementation of Section 309(j) of)	
the Communications Act - Competitive)	PP Docket No. 93-253
Bidding)	

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REQUEST FOR STAY

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Dated: July 21, 1994

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**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

In the Matter of)	
)	
Amendment of the Commission's Rules to Establish New Personal Communications Services; and)	GEN Docket No. 90-314 RM-7140, RM-7175, RM-7618
)	
Implementation of Section 309(j) of the Communications Act - Competitive Bidding)	PP Docket No. 93-253
)	

REQUEST FOR STAY

Cincinnati Bell Telephone Company ("CBT"), by its attorneys, hereby requests that the Commission stay the effectiveness of its June 13, 1994 Memorandum Opinion and Order (the "*PCS Order*") in the Personal Communications Services (PCS) proceeding,¹ or, in the alternative, stay the effectiveness of its Fifth Report and Order (the "*Competitive Bidding Order*") released July 15, 1994 in the Competitive Bidding proceeding² as it relates to the PCS service areas where the Cincinnati SMSA Limited Partnership currently provides cellular service.³

¹ In the Matter of Amendment of the Commission's Rules to Establish New Personal Communications Services, GEN Docket No. 90-314, RM-7140, RM-7175, RM-7618, Memorandum Opinion and Order, released June 13, 1994 (the "*PCS Order*").

² In the Matter of Implementation of Section 309(i) of the Communications Act - Implementation of Competitive Bidding, PP Docket No. 93-253, Fifth Report and Order, released July 15, 1994 (the "*Competitive Bidding Order*").

³ The Cincinnati SMSA Limited Partnership operates a cellular mobile telephone business in the geographic triangle bounded generally by the cities of Cincinnati, Columbus and Dayton, Ohio.

I. SUMMARY

On July 1, 1994 CBT filed a Petition for Review in the United States Court of Appeals for the Sixth Circuit⁴ challenging the legality of the cellular eligibility restriction affirmed by the Commission in the *PCS Order*. The cellular eligibility restriction prohibits entities holding interests of 20 percent or more in cellular licenses covering 10 percent or more of the population in a given PCS service area from obtaining more than 10 MHz of broadband PCS spectrum in that PCS service area.⁵

CBT, through its affiliate Cincinnati Bell Cellular Systems Company ("CBCS"), currently holds a 45.008 percent interest, as a limited partner, in the Cincinnati SMSA Limited Partnership, which operates a cellular license covering more than 10 percent of the population in the Cincinnati Major Trading Area (MTA). As a result of this minority limited partnership interest, CBT is prohibited from obtaining more than one 10 MHz Basic Trading Area (BTA) license in the Cincinnati area, and is completely ineligible for any of the 30 MHz MTA licenses in the Cincinnati area. The Cincinnati SMSA Limited Partnership is currently the subject of a dissolution proceeding in the Delaware Court of Chancery. Depending on the outcome of that proceeding, the cellular interests which currently make CBT subject to the cellular eligibility restriction may well be liquidated.

The *Competitive Bidding Order* establishes auction procedures for awarding broadband PCS licenses. While the *Competitive Bidding Order* does not specify the date

⁴ See, Cincinnati Bell Telephone Company v. Federal Communications Commission and the United States of America, Case No. 94-3701, Petition for Review of an Order of the Federal Communications Commission, filed July 1, 1994.

⁵ See, 47 CFR §24.204.

these auctions will begin, it does indicate that the 30 MHz MTA licenses will be auctioned first.⁶ As a result, it seems highly unlikely that either the appeal of the *PCS Order* or the dissolution proceeding will be finally adjudicated before the auction process begins. Accordingly, CBT hereby requests a stay of broadband PCS auction process (as it relates to the PCS service areas where the Cincinnati SMSA Limited Partnership currently provides cellular service) pending the outcome of CBT's appeal and the Delaware dissolution proceeding.

II. STANDARD FOR GRANT OF STAY

CBT satisfies the test set forth in Virginia Petroleum Jobbers Association v. Federal Power Commission⁷ and Washington Metropolitan Area Transit Commission v. Holiday Tours, Inc.,⁸ as to when a stay is warranted. The test requires four factors to be evaluated: (1) the likelihood of the requesting party's success on the merits; (2) the likelihood that irreparable harm to the requesting party will result in the absence of a stay; (3) the absence of harm to other interested parties in the event that the stay is granted; and (4) the extent to which the stay serves the public interest.⁹ Where consideration of factors two through four favor the grant of a stay, the requesting party must show only that serious questions have

⁶ *Competitive Bidding Order* at para. 37.

⁷ 259 F.2d 921, 925 (D.C. Cir. 1958) ("Virginia Jobbers").

⁸ 559 F.2d 841 (D.C. Cir. 1977) ("Washington Transit").

⁹ Virginia Jobbers at 925; Washington Transit at 843.

been raised with respect to the merits.¹⁰ An evaluation of the four factors as follows shows that the broadband PCS auctions for the Cincinnati area licenses should be stayed pending the outcome of CBT's appeal of the *PCS Order* and, if necessary, pending dissolution of the Cincinnati SMSA Limited Partnership.

III. LIKELIHOOD OF SUCCESS ON THE MERITS

A. Appeal of the PCS Order

As mentioned above, CBT holds a non-controlling limited partnership interest in the Cincinnati SMSA Limited Partnership (the "Partnership")¹¹ and, therefore, is adversely affected by the cellular eligibility restriction. The Commission's purpose in adopting this eligibility restriction was to reduce the potential for unfair competition by limiting the ability of cellular operators to bid for PCS spectrum in areas where they provide cellular service.¹² In its appeal of the *PCS Order*, CBT will show that the cellular eligibility restriction needlessly and arbitrarily precludes non-controlling, minority cellular investors like CBT from fully participating in PCS, and does not further the purpose for which the rule was adopted.

¹⁰ Washington Transit at 843.

¹¹ As a result of this minority limited partnership interest, Section 24.204 prohibits CBT from obtaining more than one 10 MHz BTA license in the Cincinnati area, and renders CBT completely ineligible for any of the 30 MHz MTA licenses in the Cincinnati area. Without this restriction, CBT would be entitled to obtain up to 40 MHz of PCS spectrum in the Cincinnati area.

¹² Second Report and Order, GEN Docket No. 90-314, at para. 105.

Whatever potential anticompetitive problems the Commission is seeking to avoid could only result from *control* of a cellular operation, not from holding a non-controlling, minority interest in such an enterprise. As a limited partner, CBT's investment in the Partnership is purely passive. Under the Partnership Agreement and Delaware law,¹³ CBT has no right to participate in management and no voting power. Consequently, CBT has no ability to affect the Partnership's operations and no ability to engage in the type of anticompetitive conduct the Commission is trying to avoid through Section 24.204. This is especially true in CBT's case where the general partner (i.e., Ameritech) holds a 52.723 percent interest in the Partnership and, therefore, has total control over the Partnership's operations.

The arbitrary 20 percent standard adopted by the Commission unfairly discriminates against CBT as the holder of a non-controlling, minority interest in the Partnership. It is an arbitrary standard which bears no relationship whatsoever to the actual degree of control exercised by CBT over the Partnership's cellular operations. There is no difference in terms of control between an entity with less than 20 percent ownership and an entity with greater than 20 percent ownership where both are limited partners in a given cellular operation and another entity holds the controlling general partnership interest. This is precisely the situation CBT faces as a result of its limited partnership interest in the Partnership, yet the Commission's arbitrary rule would afford CBT rights that are vastly inferior to those afforded other entities with less than 20 percent ownership.

¹³ The Partnership is a Delaware limited partnership and, therefore, is subject to Delaware law.

CBT recognizes that the Commission will likely hold a different view with respect to the merits of CBT's appeal, given that the Commission authored the *PCS Order*. CBT submits, however, that the likelihood of its success on the merits warrants the grant of a stay. In any case, CBT raises serious legal issues which, when considered in conjunction with the likelihood of irreparable harm, the absence of harm to other parties, and the public interest, clearly warrant the granting of a stay.

B. Pending Dissolution Proceeding

In addition to CBT's appeal of the *PCS Order*, CBT has initiated a proceeding in the Delaware Court of Chancery seeking dissolution of the Partnership.¹⁴ The Partnership was formed in 1982 to market, service and operate a cellular mobile telephone business in the geographic triangle bounded generally by the cities of Cincinnati, Columbus and Dayton, Ohio. The respective percentage interests of the general and limited partners in the Partnership as of the date of this request are as follows:

General Partnership Interests

Ameritech Mobile Phone Service of Cincinnati, Inc.	40.000%
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Limited Partnership Interests

Ameritech Mobile Phone Service of Cincinnati, Inc.	12.723%
Cincinnati Bell Cellular Systems Company	45.008%
Sprint Cellular Company	1.200%
Champaign Telephone Company	.244%
GIT-Cell, Inc.	.825%

¹⁴ See, Cincinnati Bell Cellular Systems Company v. Ameritech Mobile Phone Service of Cincinnati, Inc., et. al., Civil Action No. 13389, Court of Chancery, State of Delaware, in and for New Castle County.

The Complaint requests that the Court enter an order dissolving the Partnership, and appointing a liquidating trustee with full power to: (1) collect all money due the Partnership; (2) pay all debts of the Partnership; (3) sell the property and assets of the Partnership, including the sale of the Partnership in its entirety; and (4) distribute any surplus assets to CBCS and the other limited partners ratably according to their respective interests. In the alternative, should the Partnership not be sold in its entirety by the liquidating trustee, the Complaint asks the Court to distribute to CBCS the licenses and assets to provide cellular telephone service in the Cincinnati and surrounding areas pursuant to the terms of the Partnership Agreement.

CBT submits that under Delaware law the Court of Chancery is likely to enter an order dissolving the Partnership. However, at this point it is unclear how the Partnership's assets will be distributed among the partners or what the time frame for such distribution will be.

IV. LIKELIHOOD OF IRREPARABLE HARM

The *Competitive Bidding Order* does not specify the date the broadband PCS auctions will begin. It does, however, indicate that the 30 MHz MTA licenses will be auctioned first.¹⁵ Every indication is that these auctions will begin in the very near future. Thus, it is highly unlikely that CBT's appeal of the *PCS Order*, and the dissolution of the Partnership, will be finally adjudicated before the broadband PCS auctions begin. Consequently, if CBT is prohibited from bidding on any of the 30 MHz licenses in the Cincinnati area as a result of

¹⁵ *Competitive Bidding Order* at para. 37.

its minority interest in the Partnership and, if the Court of Appeals subsequently strikes down the cellular eligibility restriction, CBT would suffer irreparable harm since its competitors will already have acquired all the 30 MHz MTA licenses available in the Cincinnati area. Similarly, if CBT is prohibited from bidding on any of the 30 MHz licenses in the Cincinnati area as a result of its minority interest in the Partnership and, if the Partnership is subsequently dissolved such that CBT ends up without an attributable interest in the cellular licenses currently operated by the Partnership, CBT will be essentially precluded from participation in both PCS and cellular service. Under these circumstances, the Commission cannot go forward with the Cincinnati area broadband PCS auctions without causing irreparable harm to CBT.

If, due to the timing of the auctions, CBT is precluded from fully participating in PCS, CBT would be placed at a tremendous disadvantage *vis a vis* its competitors. Recent panel discussions conducted by the Commission's PCS Task Force provide an independent basis for this conclusion. Most of the panelists at those discussions agree that demand for PCS, both as a complement to existing wireline telephone service and as a replacement thereof, will grow sharply once PCS is licensed and deployed. For example, the Personal Communications Incorporated Association estimates that PCS subscriptions will reach 8.55 million by the end of the first three years of service deployment and grow by 264 percent between 1998 and 2003.¹⁶ That equates to a market penetration rate of approximately 3.1 percent by the end of the first three years and 10.4 percent by 2003. Similarly, Dr. C. J.

¹⁶ See, Panel No. 1: PCS Demand Predictions - Statement of Thomas A. Stroup, President, Personal Communications Industry Association, at p. 4.

Waylan of GTE Personal Communications Services estimates that by the year 2005 total wireless voice services - including both cellular and PCS - will reach some 30 percent of the population. This translates into a market penetration of approximately 70 percent of U.S. households.¹⁷ As a wireline carrier, CBT would be irreparably harmed if it is denied the opportunity to fully participate in this wireless revolution.

V. ABSENCE OF HARM TO OTHER PARTIES

No other party will be harmed if a stay is granted. A stay would simply preserve the status quo until the Court of Appeals has an opportunity to review the legality of the cellular eligibility restriction and the Partnership is dissolved. Currently, there are no entities licensed to provide broadband PCS. Thus, a stay would not give any party a jump on the competition. No matter what the Court of Appeals decides with respect to the cellular eligibility restriction, or what the Court of Chancery decides with respect to the dissolution proceeding, the Commission can begin the PCS auction process for the Cincinnati area licenses without harm to any other party once those cases have been resolved.

VI. THE PUBLIC INTEREST

The Virginia Jobbers court recognized that the stay of an administrative order raises particular public interest concerns.¹⁸ The Commission would err in assuming that the public

¹⁷ See, Panel No. 1: PCS Demand Predictions - Prepared Remarks of Dr. C. J. Waylan, GTE Personal Communications Services, at p. 2.

¹⁸ Virginia Jobbers at 924.

interest would best be served by starting the auction process prior to the Court's decision on the legality of the cellular eligibility restriction and prior to dissolution of the Partnership. A stay of the auction process for the Cincinnati area licenses will promote competition by ensuring that eligibility restrictions are as narrow as possible. Allowing CBT to participate in the auctions will increase the number of bidders and, therefore, is likely to increase the revenue generated by the auctions. This is clearly in the public interest since auction revenues will be used to reduce the Federal budget deficit.¹⁹

The Commission has acknowledged the benefits to consumers from permitting local exchange carriers like CBT to participate in PCS.²⁰ CBT has the resources and technological expertise to foster the rapid deployment of PCS in its service territory. Indeed, CBT may represent the best opportunity to bring PCS services rapidly to consumers. Moreover, CBT may well be able to offer a broader range of PCS services at a lower cost than other potential licensees. Failure to grant a stay would unnecessarily restrict CBT's entry into PCS and harm consumers by excluding a viable competitor from the wireless telecommunications marketplace.

In order to remain competitive, CBT must have the same opportunity to provide PCS as cable companies, competitive access providers and other entities. Without the opportunity to fully participate in PCS, CBT may not be able to offer its customers the full range of telecommunications services made possible by the wireless revolution. This would be detrimental not only to CBT, but to the public as well.

¹⁹ See 47 U.S.C. §309(j)(8).

²⁰ Second Report and Order, at para. 126.

VII. CONCLUSION

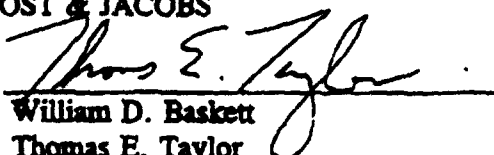
CBT has raised significant questions regarding the legality of the cellular eligibility restriction set forth in the *PCS Order*. CBT has also shown that even if this restriction is upheld by the Court of Appeals, CBT may still be able to participate in the auctions since its interest in the Partnership may well be liquidated in the Delaware dissolution proceeding. These questions should be reviewed and resolved before the broadband PCS auctions begin for licenses in the Cincinnati area. Only through full and equitable operation of the legal process can responsible and effective regulation be achieved.

WHEREFORE, good cause having been shown, CBT respectfully requests that the Commission stay the broadband PCS auction process (as it relates to the PCS service areas where the Cincinnati SMSA Limited Partnership currently provides cellular service) until CBT's appeal of the *PCS Order* and the Delaware dissolution proceeding are resolved.

Respectfully submitted,

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